

No. PD-0928-20

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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS
OF TEXAS

Ijah Iwasey Baltimore
v.
State of Texas

On Petition for Discretionary Review from the Tenth Court of Appeals in
No. 10-19-00196-CR affirming the judgments in cause number 2017-449-C2,
from the 54th District Court, McLennan County

APPELLANT IJAH IWASEY BALTIMORE'S BRIEF

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STATEMENT OF THE CASE

On October 26, 2020, Baltimore filed his Petition seeking this Court's discretionary review. *See generally* TEX. R. APP. P. 66. Baltimore sought review because the Tenth Court of Appeals (following the decisions of the Houston, Fort Worth and Amarillo courts) decided an important question of state law that has not been, but Baltimore suggested should be, settled by this Court; specifically, whether a parking lot in front of a licensed premises is included within the 'premises' under section 11.49(a) of the Alcoholic Beverage Code as a matter of law. *See* TEX. R. APP. P. 66.3(b).

On January 13, 2021, this Court granted his Petition and request for oral argument and ordered this brief. On February 12, Baltimore was granted one two-week extension to file this brief by March 1.

STATEMENT REGARDING ORAL ARGUMENT

The Court has advised the parties that oral argument will be permitted. Baltimore requested oral argument because he believes it would aid the Court's decisional process.

GROUND PRESENTED

- I. Whether the State must offer proof of the parameters of a licensed premises to secure a conviction for unlawful carrying of a weapon on a licensed premises.
- II. Whether the Alcoholic Beverage Code 11.49(a) definition of “premises” applies to the Penal Code Section 46.02 which contains its own definition of the term “premises”.
- III. Whether a parking lot in front of a licensed premises is included within the “premises” under section 11.49(a) of the Alcoholic Beverage Code as a matter of law.

STATEMENT OF FACTS

Following a jury trial, Baltimore was convicted of third-degree felony offense of unlawful carrying of a weapon on a premise licensed to sell alcoholic beverages.¹See Tex. Penal Code § 46.02. Thanksgiving night of 2016, Baltimore, a United States Air Force veteran, briefly went to the McLennan County-based bar, Crying Shame after he got off work (6 RR 103-104, 7 RR 9). Baltimore did not carry a firearm inside Crying Shame (6 RR 30, 46, 64).

After less than a half hour, Baltimore left Crying Shame to the parking lot to get on his motorcycle and go home (*id.* at 43-44). All events that followed occurred in the parking lot (*id.* at 8, 13, 30, 21, 43, 52, 106).

When he testified, Baltimore explained that he had just finished putting on his motorcycle gear, standing at his bike, about to leave the parking lot and that his gun was in his saddle bag, rolled up in his jacket (*id.* at 119-20). He was heading immediately home (*id.* at 117), and that his gun was out of his saddlebag, under his jacket, and in his pants (*id.* at 121).

¹ Although the indictment did not allege on which licensed premises Baltimore was accused of unlawfully carrying a weapon, any potential defect was not raised pretrial nor at trial and therefore waived. *State v. Lohse*, 881 S.W.2d 171 (Tex. App.—Houston [1st Dist.] 1994, pet. ref.)

Baltimore testified that at the time he was approached by a male he did not know the gun “was actually falling down my pants,” and that his hand was grabbed by the unknown male while he was adjusting the gun, to prevent it from falling (*id.*). The gun was taken from him and it was put in his face (*id.* at 122), and then the unknown male “tried to take the firearm and leave,” (*id.* at 123). Baltimore told the unknown male he was not going to let him leave with the firearm because it was registered to him, and the unknown male cocks it back, throws it on the roof and runs off (*id.*). Baltimore admitted that the firearm was his, that he carried it in his motorcycle’s saddlebag, and that he was in his vehicle, intending to go home at the time (*id.* at 126). The other involved parties had a different account. *Baltimore v. State*, 608 S.W.3d 864, 867-68 (Tex. App. – Waco 2020, pet. granted).

In closing, Baltimore argued that he was directly en route to his motorcycle that was owned by him, and under his control (*id.* at 147-48). He reminded the jury that there was no evidence of him possessing a gun inside Crying Shame, and that the only evidence was that he was on and by his motorcycle (*id.*).

In addition to arguing that the State had proven every element, importantly in the State's closing, as to the definition of "premises" the State read to the jury as follows from the charge: "premises is defined by the Texas Alcohol and Beverage Code is – means the ground and all buildings, vehicles, and appurtenances pertaining to the grounds. That means that property belonging to that establishment is part of that premises." (*Id.* at 143.) In closing, the State concluded: "You have multiple witnesses who testified he was there that night, he pointed the gun at Ty Johnson, and *he was at the Crying Shame*, an alcohol establishment in the State of Texas. . . ." (*id.* at 145) (emphasis added).

The State's argument in rebuttal was that "if [Baltimore] didn't want to break the law and have a gun out on his person at a bar, left it in his saddlebag. He had to unroll it and could have put it back in. But he didn't, he put it on him," (*id.* at 152). The State further argued that "even if for some reason you decide to believe a story you shouldn't, he's still guilty. Still guilty. Had it on him, wasn't en route to a vehicle," (*id.* at 154).

Baltimore raised a sole point of error before the Tenth Court of Appeals at Waco challenging the legal sufficiency of the evidence to

support his conviction (Appellant's Br. at iii, ix). Specifically, he argued that there is no evidence regarding the location of the boundaries of the licensed premises, the Crying Shame, such as testimony that the parking lot was part of the "grounds" or was "directly or indirectly under the control" of the Crying Shame. *Id.*

The court of appeals held that there was sufficient evidence that area where Baltimore displayed firearm in the parking lot outside the Crying Shame was a "grounds or an adjacent premises that was directly or indirectly under the control of" the bar to support conviction. *Baltimore*, 608 S.W.3d at 868.

SUMMARY OF THE ARGUMENT

It is important that this Court settle the issue of whether a parking lot in front of a licensed premises is part of the ‘premises’ under section 11.49(a) of the Alcoholic Beverage Code as a matter of law, merely because of its proximity to the licensed premises. *Richardson v. State*, 823 S.W.2d 773 (Tex. App. – Ft. Worth 1992, no pet.). Currently, *Richardson* is being used as the authority for that statement of law. *George v. State*, 1995 WL 155535 (Tex. App. – Houston [1st] April 6, 1995, no pet.) (not designated for publication (“ . . . a parking lot of a licensed premises is controlled by the licensee as a matter of law.”)).

To have put on legally sufficient evidence, the State must have proved that the parking lot was a premises within the Alcoholic Beverage Code Section 11.49(a) definition by which the trial court charged the jury (6 RR 136-37). The parking lot is not a building, vehicle or appurtenance. Therefore, the State was left to prove that it was grounds or an adjacent premise that was directly or indirectly under the control of Crying Shame (*id.* at 137). It failed to do so.

ARGUMENT & AUTHORITIES

- I. **The State must offer proof of the parameters of a licensed premises to secure a conviction for unlawful carrying of a weapon on a licensed premises.**

A parking lot in front of a licensed premises should not be deemed as part of a licensed premises as a matter of law without evidence that the licensee exercised some control over the parking lot. *Terry v. State*, 877 S.W.2d 68 (Tex. App.—Houston [1st] 1994, no pet.). *But see Richardson*, 823 at 773.

Baltimore complained to the Waco Court that there was no evidence regarding the boundaries of the premises including whether the parking lot was “grounds” or “directly or indirectly under the control” of Crying Shame. *Baltimore*, 608 S.W.3d at 867.

- A. **There is an open question as to whether the Alcoholic Beverage Code 11.49(a) definition of “premises” applies to Penal Code § 46.02, which contains its own definition of the term “premises.”**

Section 11.49(a) of the Alcoholic Beverage Code defines “premises” as:

the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

In contrast, Penal Code § 46.02 has its own definition:

(a-2) For purposes of this section, “premises” includes real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent. In this subsection, “recreational vehicle” means a motor vehicle primarily designed as temporary living quarters or a vehicle that contains temporary living quarters and is designed to be towed by a motor vehicle. The term includes a travel trailer, camping trailer, truck camper, motor home, and horse trailer with living quarters.

Tex. Penal Code § 46.02(a-2).

Here, the jury was charged on the 11.49(a) definition (6 RR 136-37).

The Court measures the sufficiency of the evidence against the hypothetically correct jury charge. *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct charge “accurately sets out the law.” *Id.*

It is thus important for this Court to determine the correct statutory definition for the term “premises” as part of its sufficiency analysis. *Terry v. State*, 877 S.W.2d 68 (Tex. App.—Houston [1st] 1994, no pet.); *Cummins v. State*, 2017 WL 2664442 at *2-3 (Tex. App.—Texarkana June 21, 2017, no pet.) (not designated for publication) (“*Terry* did not hold, however, that it was error to omit the Alcoholic

Beverage Code definition of “premises” from the charge, and we find no cases which so hold”). The Waco Court assumed without deciding that the definition in section 11.49(a) of the Alcoholic Beverage Code was the correct definition. *Baltimore*, 608 S.W.3d at 867, n. 2.

B. Regardless of the definition employed, the State must prove that the location where a person possessed a weapon was under the control or ownership of the licensee.

Baltimore directed the Waco court’s attention to *Terry v. State*, as the example of what the State should have done to secure a legally sufficient conviction.

If the State here had put on the same or comparable testimony as was put on in *Terry v. State*, 877 S.W.2d 68 (Tex. App.—Houston [1st] 1994, no pet.), Baltimore concedes there would not be a sufficiency issue. In *Terry*, appellant raised insufficiency on the same basis as Baltimore did to the Waco court with a slight variance.² The *Terry* testimony in support of the parking lot as a Section 11.49(a) premises was clear: a copy of the liquor

² His first (of three) issues were regarding the definition of premises used in the jury charge. (*Id.* at 69). Appellant argued that if the “correct” Penal Code § 46.02 definition had been used in the jury charge; the evidence was insufficient. Appellant likewise conceded that if the Section 11.49(a) definition was used that the parking lot would be included and therefore the evidence sufficient.

permit was introduced into evidence through an ABC agent, who described the premises as including the Section 11.49(a) language. Further, an employee of the club, who was also present on the night of the incident, testified that the parking lot was used by club customers and maintained by club employees, and that the club in fact owned the dumpster by which appellant was first seen standing with the weapon. (*Id.* at 70). This testimony clearly supports a finding that either a parking lot or dumpster is an adjacent premises that were shown to be directly or indirectly under the control of the club permittee. (*Id.*) Such evidence is absent here.

C. Here, the State failed to prove that the parking lot was under the control or ownership of the licensee and control or ownership could not be inferred from the evidence presented.

To support its holding that there was sufficient evidence that area where Baltimore displayed a firearm in parking lot outside bar was “grounds or an adjacent premises that was directly or indirectly under the control of” the bar, the court of appeals relied on four facts: (1) that one of the officers testified that “the parking lot was included as part of the premises of the Crying Shame and (2) that the legal definition of “premises” pursuant to the Beverage Code includes the parking lot; (3)

there was photographic evidence that showed the offense occurred in the immediate proximity of the front door to the building of the Crying Shame; and (4) that the management of the Crying Shame exercised some degree of control over the parking lot by preventing the patrons from going on the premises where the investigation was then ongoing. *Baltimore*, 608 S.W.3d at 868.

Two responding officers testified: Officers Billy Gann and Brandon Garrett (6 RR 37, 66). Regarding the location of the incident, Officer Gann's testimony was as follows (*id.* at 37- 46):

STATE: And all of this happened in the parking lot of the Crying Shame?

OFFICER: Yes.

STATE: Which, again, is a -- a bar in McLennan County?

OFFICER: It is a bar. It's licensed to sell alcohol through TABC. Yes.

(*id.* at 43-44)

Regarding the location of the incident, Officer Garrett's testimony was as follows (*id.* at 66-88):

STATE: And is the Crying Shame, is that a -- a bar here in McLennan County?

OFFICER: Yes, ma'am.

STATE: Is that a place licensed to sell alcohol by the State of Texas and TABC?

OFFICER: Yes, ma'am.

One detective, who only performed administrative processing of Baltimore's gun and did not respond to the call for service, also testified regarding the location of the incident as follows (*id.* at 89-101; 8 RR 25):

STATE: And [Crying Shame] is licensed to sell alcohol by the TABC?

DETECTIVE: Yes.

STATE: And that's the Texas Alcoholic Beverage Commission?

DETECTIVE: That's correct.

STATE: And then included as part of the premises of the Crying Shame, that includes the parking lot?

DETECTIVE: Yes.

STATE: And the legal definition of premises, for purposes of this statute, includes the parking lot?

DETECTIVE: Yes.

(*id.* at 97)

Regarding the photo, which was State's Exhibit 8, was admitted to

show “the parking lot and the defendant's motorcycle positioned in front of the building” (*id.* at 31).

Baltimore still suggests that the absence of testimony regarding whether the parking lot was directly or indirectly under the control of the Crying Shame still renders the evidence legally insufficient. (Appellant’s Br. at 1.).

As Baltimore cautioned the Waco court, a parking lot is not necessarily a part of a permittee’s “grounds or an adjacent premises” without affirmative evidence that it is. *See Wishnow v. Texas Alcoholic Beverage Com’n*, 757 S.W.2d 404, 410 (Tex. App. — Ft. Worth 1988, writ denied). A permittee’s control of a parking lot cannot be inferred from mere proximity. It is all too common that parking lots are privately owned, publicly owned by a municipality, a hybrid of private-public ownership, or serve multiple businesses.³

Regarding the exercise of “some degree of control over the parking lot by preventing patrons” from leaving, Officer Garrettt testified as

³ For example, most shopping malls are mixed use between retail and restaurant chains. According to *Mall & Centers Shopping Guide*, there are 158 malls in Texas. Available at: <https://tinyurl.com/y2e2l25q>.

follows:

STATE: So the proprietors or the owners of the Crying Shame actually locked everybody else inside to keep them from coming outside to -- to help you with your scene; is that right?

OFFICER: Yes.

(6 RR 71). Baltimore remains unclear how this act showed control over the parking lot.

As a practical matter, Baltimore reads the Waco court opinion as holding that a person cannot carry a handgun inside of or directly en route to their motor vehicle if the vehicle is in a parking lot merely near an establishment licensed to sell alcoholic beverages. Under today's commercial standards, parking lots are frequently shared by many businesses, and their ownership and control vary widely.

Therefore, to sustain a conviction for unlawfully carrying a weapon on a licensed premises when the alleged offense occurs in a parking lot near a licensed premises, the State must prove that the parking lot is either: (1) actually part of the grounds of the licensed premises (*i.e.*, owned or leased by the licensed premises); or (2) under the direct or indirect control of the licensed premises. The State failed to offer such evidence in

Baltimore's case, and the Waco Court accordingly erred by finding the evidence sufficient to sustain his conviction.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant Baltimore prays this Court reverse the lower court's judgment and hold that, because the evidence is legally insufficient, an acquittal is required.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Petition was e-served on both Sterling Harmon of the District Attorney for McLennan County, Texas, at sterling.harmon@co.mclennan.tx.us and State Prosecuting Attorney at Stacey.Soule@spa.texas.gov, on March 1, 2021.



Attorney for Appellant

IN THE COURT OF CRIMINAL APPEALS
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IJAH BALTIMORE

§

§

v.

§

NO. PD-0928-20

§

STATE OF TEXAS

§

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(2)(D), I hereby certify that the Appellant's
Petition contains 3395 words. The document was prepared using Microsoft
Word, and the word count was generated using that program.



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